

CALIFORNIA COASTAL COMMISSION

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Staff Report: 9/22/99
Hearing Date: 10/12-15/99
Commission Action:

STAFF REPORT: APPEAL
SUBSTANTIAL ISSUE

LOCAL GOVERNMENT: County of Orange

LOCAL DECISION: Approval with Conditions

APPEAL NUMBER: A-5-IRC-99-301

APPLICANT: **Irvine Community Development Company**

AGENT: Carol Hoffman, The Irvine Company
M. Andriette Culbertson

PROJECT LOCATION: Southern Coastal Orange County, North of PCH, West of Crystal Cove State Park and East of the City of Newport Beach, Irvine Coast (Newport Coast), Orange County

PROJECT DESCRIPTION: Appeal of County of Orange approval of Seventh Amendment to the Master Coastal Development Permit to establish mass grading and backbone infrastructure for future development in Newport Coast Planning Areas 4A, 4B, 5, 6, 12C, 12E and 12G (Phase IV-3/IV-4. Approval of Vesting Tentative Tract Map 15447.

APPELLANTS: Coastal Commissioners Pedro Nava and Sara Wan

SUMMARY OF STAFF RECOMMENDATION

The staff recommends that the Commission, after public hearing, determine that **a substantial issue exists** with respect to the grounds on which the appeal has been filed for the following reason: Pursuant to Section 30603(b)(1) of the Coastal Act the locally approved development does not conform to the County of Orange Newport Coast (Irvine Coast) certified Local Coastal Program (LCP). More specifically, the locally approved coastal development permit (1) does not conform to the environmentally sensitive habitat area (ESHA) policies of the certified LCP by allowing the elimination of a drainage course in Planning Area (PA) 5 for residential development and the filling of drainage courses and wetlands for residential, recreational, private road and drainage facility

purposes in Planning Areas 4A, 4B, 6 and 12C; (2) approves development outside of the LCP area (within the adjacent Crystal Cove State Park which has a certified Public Works Plan); and (3) unilaterally deletes the Commission's appeal jurisdiction areas to allow for grading of USGS "Blue line" drainage courses within residential, open space and recreation planning areas (Exhibit 7). The motion to carry out the staff recommendation is on page 2.

Further, staff recommends that the Commission direct the staff to appeal local permit PA 98-0187 for the construction of a private recreation facility in Planning Area (PA) 12C. PA 98-0187 prematurely approves development that would utilize the infrastructure that is the subject of this appeal. The notice of final local action received by the Commission from the local government for the construction of this facility incorrectly indicated that this related permit was not appealable.

Finally, staff recommends that the Commission **continue the de novo hearing** to a future Commission meeting in order to allow additional information to be submitted by the project applicant and reviewed by Commission staff. The required additional information includes a wetland delineation of all on-site wetlands based on Coastal Act wetland criteria, information on the biology of all of the drainage courses that are proposed to be eliminated and/or modified, and an analysis of alternatives to the proposed project that would avoid the elimination and/or modification of wetlands and streams designated as environmentally sensitive habitat areas (ESHA) in the certified LCP. The additional information is necessary for Commission staff to analyze the project and make a recommendation for the de novo stage of the appeal.

SUBSTANTIVE FILE DOCUMENTS:

1. Record for Local Coastal Development Permit No. PA 97-0152.
2. County of Orange Newport Coast Certified Local Coastal Program.
3. County of Orange Coastal Permit No. PA 98-0187

STAFF RECOMMENDATION ON SUBSTANTIAL ISSUE

The staff recommends that the Commission determine that **a substantial issue exists** with respect to the conformity of the project approved by the County with the policies of the Newport Coast (Irvine Coast) certified Local Coastal Program, pursuant to Public Resources Code Section 30625(b)(2).

MOTION: Staff recommends a **NO** vote on the following motion:

I move that the Commission determine that Appeal No. A-5-IRC-99-301 raises **NO** substantial issue with respect to the grounds on which the appeal has been filed.

A majority of the Commissioners present is required to pass the motion.

FINDINGS AND DECLARATIONS

I. APPELLANTS' CONTENTIONS

Local Coastal Development Permit No. PA 97-0152, approved by the County of Orange Planning Commission on July 21, 1998, has been appealed by two Coastal Commissioners on the grounds that the approved project does not conform to the requirements of the Certified LCP. The appellants contend that the proposed development does not conform to the requirements of the certified LCP in regards to the following issues:

Approval of Development Outside of the Boundaries of the LCP

The appellants contend that the County's permit approves development outside of the LCP area. Specifically, development is approved in the adjacent Crystal Cove State Park which is publicly owned by the Department of Parks and Recreation and governed by a certified Public Works Plan. The County does not have the authority to issue a local coastal development permit for development in the State Park. Approval of development outside the certified LCP area is inconsistent with the authority delegated to the County under the LCP. Therefore, the coastal permit approved by the County raises a substantial issue of consistency with the certified LCP.

Removal of the Commission's Appeal Jurisdiction from Certain Areas

The County's approval purports to delete the Commission's appeal jurisdiction in several planning areas. The certified LCP establishes the appeal jurisdiction of the Commission consistent with the Coastal Act. The local government can not unilaterally modify the Commission's appeal jurisdiction because the Commission's appeal jurisdictions is statutorily prescribed. The statute defines this appeal jurisdiction, in part, based on the existing physical characteristics of the land. The County's approval treats the Commission's appeal jurisdiction as being affected before a physical change has legally occurred on the ground. Therefore, the purported removal of the Commission's appeal jurisdiction through this permit action by the local government is inconsistent with the Coastal Act and raises a substantial issue of consistency with the provisions of the certified LCP regarding appeal procedures.

Elimination of a designated ESHA (drainage course) in PA 5

The certified LCP specifically lists the Planning Areas in which Category "D" ESHAs can be modified or eliminated. The LCP policy which allows for some Category "D" ESHAs to be modified does not allow for the ESHA in Planning Area (PA) 5 to be modified or eliminated. Therefore the County's permit which allows for the total elimination of the Category "D" ESHA in PA 5 raises a substantial issue of consistency with the certified LCP.

Modification and/or Elimination of designated ESHA (wetlands and drainage courses)

The County's approval allows the modification or elimination of wetlands and USGS "Blue-line" streams which are designated Category "A" "B" and "D" ESHAs in Planning Area (PA) 4A, 5, 6 and 12C. As stated above, the LCP does not allow the modification of the ESHA in PA 5 at all. The LCP also designates wetlands as ESHA and does not allow development in any wetlands. Further, the LCP requires that, except for the ESHA B located in Planning Area 4A, the natural drainage courses in Category "A" and "B" ESHAs will be preserved in their existing state. The permit approved by the County approves development (a detention basin and a private road) within a Category "A" ESHA in PA 12C. The permit also approves wetlands to be filled for the construction of the detention basin and for residential development in PA 4A. Therefore, the permit approved by the County raises a substantial issue of consistency with the ESHA protection policies of the LCP.

Finally, the County's interpretation of its ESHA policies also raises a substantial issue given the Appellate Court decision in *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493. The *Bolsa Chica* decision involved the Coastal Commission's approval of a local coastal program amendment that authorized development within wetlands and environmentally sensitive habitat areas. The Court of Appeal held that the Commission acted improperly in approving residential development and the expansion of a road in parts of the proposed development site that included an environmentally sensitive habitat area and wetlands. Because the County has also interpreted its policies to allow residential development within environmentally sensitive habitat areas and wetlands, the appeal raises issues of statewide significance.

II. LOCAL GOVERNMENT ACTION

On July 21, 1998 the Orange County Planning Commission held a public hearing and conditionally approved coastal permit application PA 97-0152 of the Irvine Community Development Company. At the conclusion of the public hearing, the Planning Commission approved the permit application with the 55 special conditions recommended by the planning staff, except for a modification to special condition 11 concerning paleontological resources, and the deletion of special condition 37 dealing with the submittal of hazardous materials to the fire chief. (Exhibit 6).

The Planning Commission's July 21, 1998 approval of the coastal permit was appealable to the Board of Supervisors within 15 calendar days. On July 30, 1998 Mr. Barbour, representing Crystal Cove Partners, the concessionaires for the future development of the Crystal Cove State Park Historic District, appealed the Planning Commission's action to the Board. However, on August 31st, Mr. Barbour withdrew the appeal after meeting with the applicant and the County planning staff. (Exhibit 4). According to the County's record, no other appeals were filed.

III. COASTAL COMMISSIONER APPEAL

The local coastal development permit approved by the County is appealable to the Coastal Commission pursuant to 30603(a)(2) of the Coastal Act because it involves development within 100 feet of streams and wetlands. Pursuant to the certified LCP and the Commission's post certification regulations, a local government's action that is appealable to the Commission is not considered effective until the Commission receives a proper final action notice, establishes the required 10 working day appeal period, and the appeal period runs without an appeal being filed. (See 14CCR Sections 13572 and 13111 and LCP sections 7-9-118.6(h)). If an appeal is filed, the locally issued permit is not final until after the Commission's final action on the appeal. According to the post certification records of the district office, the County did not forward the notice of final action within 7 calendar days as required by the certified LCP.

On July 27, 1999 staff received correspondence from a member of the public, including a July 22 Los Angeles Times article concerning the pending Army Corp of Engineers permit to modify and/or eliminate streams within the subject appeal area. The correspondence received by Commission staff questioned whether the Commission had jurisdiction over this activity. In response to the public inquiry, staff contacted the County of Orange to determine if they had issued a coastal permit including such activity. The Orange County planner indicated that the fill had been approved in conjunction with their July 1998 approval of application 97-0152, also known as the seventh amendment to the master coastal development permit for the Newport Coast Area.

When Commission staff researched the district post-certification records, staff learned that a Notice of Public Meeting concerning EIR 569 had been received on May 12, 1998 and a Notice of Public Hearing on July 15, 1998 had been received concerning the coastal permit application PA 97-0152. However, no other notices of County action had been received. Staff requested that the County send the notice of final action. Upon receipt of the Notice of Final Decision on August 5, 1999, staff opened the 10 working day appeal period as required by the certified LCP. On August 12, 1999 Commissioners Wan and Nava appealed the County's approval of the subject permit, within 10 working days of receipt of the Notice of Final Decision.

The applicant and their representative have stated that the subject appeal is not proper and assert that staff had previously received effective notice of the County's approval of permit PA 97-0152. They cite the fact that staff had received (1) the notice of the EIR; (2) the pending hearing notice; and (3) the Notice of Final Decision for a subsequent permit PA 98-0187 that approved development that would utilize the infrastructure that is the subject of this appeal.

Section 7-9-118.6(h) of the County's LCP specifically states that a local approval is not effective until after the 10 working day appeal period to the Commission has expired. As reflected in section 7-9-118.6(h)(2)(a) of the County's LCP, the 10 working day appeal period to the Commission does not commence until after the Commission receives a valid notice of final location action (See Exhibit 8).

Accordingly, with regard to the notice of EIR and the pending hearing notice, neither notice constitutes the notice of final local government action required by the County's certified LCP and the Commission's post certification regulations. With regards to the receipt by the Commission of the

notice of final action for a subsequent permit which approved development that would utilize the infrastructure that is the subject of this appeal, the reference to the approval of the subject appeal contained within this subsequent permit also does not constitute the required notice of final local action for the subject appeal. Moreover, the notice of final local action for this subsequent permit does not itself constitute a valid notice of final local action because the notice failed to identify that the development was appealable to the Commission. (See further discussion of this issue in Section VI below.)

The Commission finds that the information cited by the applicant does not constitute the required submittal of the notice of final action that must be received by Commission staff in order to establish the required appeal period for all appealable development. Therefore, the Commission finds that the appeal period on PA 97-0152 did not commence until the Commission received notice of final local action on August 5, 1999. Consequently, the Commission finds that the appeal by Commissioners Wan and Nava was timely filed on August 12, 1999, within 10 working days of receipt by the Commission of the final local action notice.

IV. APPEAL PROCEDURES

After certification of Local Coastal Programs, the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits. Developments approved by cities or counties may be appealed if they are located within the mapped appealable areas, such as those located between the sea and the first public road paralleling the sea or within 300 feet of the top of the seaward face of a coastal bluff. Also, developments approved by the local government that are located within 100 feet of any wetland, estuary, or stream may be appealed. Furthermore, developments approved by counties may be appealed if they are not designated the "principal permitted use" under the certified LCP. Finally, developments which constitute major public works or major energy facilities may be appealed, whether approved or denied by the city or county. [Coastal Act Section 30603(a)].

Section 30603(a)(2) of the Coastal Act identifies the proposed project site as being in an appealable area by its location being within 100 feet of a stream or wetland.

Section 30603 of the Coastal Act states:

- (a) After certification of its Local Coastal Program, an action taken by a local government on a Coastal Development Permit application may be appealed to the Commission for only the following types of developments:
 - (1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.

- (2) Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.

The grounds for appeal of an approved local Coastal Development Permit in the appealable area are stated in Section 30603(b)(1), which states:

- (b)(1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in this division.

The action currently before the Commission is to find whether there is a "substantial issue" or "no substantial issue" raised by the appeal of the local approval of the proposed project. Section 30625(b)(2) of the Coastal Act requires a de novo hearing of the appealed project unless the Commission determines that no substantial issue exists with respect to the grounds for appeal.

If Commission staff recommends a finding of substantial issue, and there is no motion from the Commission to find no substantial issue, the substantial issue question will be considered moot, and the Commission will proceed to the de novo public hearing on the merits of the project. The de novo hearing will be scheduled at the same hearing or a subsequent Commission hearing. A de novo public hearing on the merits of the project uses the certified LCP as the standard of review. In addition, for projects located between the first public road and the sea, findings must be made that any approved project is consistent with the public access and recreation policies of the Coastal Act. Sections 13110-13120 of the California Code of Regulations further explain the appeal hearing process.

If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. The only persons qualified to testify before the Commission at the substantial issue portion of the appeal process are the applicants, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing.

The Commission will then vote on the substantial issue matter. It takes a majority of Commissioners present to find that no substantial issue is raised by the local approval of the subject project.

V. SUBSTANTIAL ISSUE

The Commission hereby finds and declares:

A. Project Description

Coastal permit PA 97-0152 is the seventh amendment to the master coastal development permit for the Newport Coast (formerly Irvine Coast) Planned Community. The permit covers approx. 980 acres and includes minor boundary adjustments between the planning areas, mass grading (17, 800,000 cubic yards of cut and 17,320,000 cubic yards of fill), and backbone infrastructure (drainage facilities, utilities, roads, etc.) for future residential, private recreation and public and private open space uses in Planning Areas (PA) 4A, 4B, 5, 6, 12C, 12 E and 12G. The development is also known as Phase IV-3 and IV-4 of the LCP area (See Exhibit 2).

Approval of Vesting Tentative Tract Map (VTTM) 15447 is also included. VTTM 15447 approved the subdivision of the area into large parcels for financing and/or sale or lease to builders (or in the case of the Conservation areas 12E and 12G, dedication to a public agency) to be further subdivided to ultimately build 635 detached single family homes on 581.5 gross acres (PA 4A, 4B, 5 and 6); the construction of a 32 acre private recreation facility on the 100 acre PA 12C site; and dedication as Conservation open space of 298.5 acres (PA 12E and 12G). The residential development closest to Pacific Coast Highway (PA 4A and 4B) is Medium density (3.5 to 6.5 du/a), in the upper areas (PA 5) Medium Low density (2 to 3.5 du/a) and Low density (up to 2du/a) in PA 6.

The permit also approved off-site development of grading and the construction of a private road into Crystal Cove State Park and the export of 480,000 cubic yards of cut material to Planning Area 3B of the LCP area.

B. LCP Area Description

The Newport Coast (formerly Irvine Coast) Local Coastal Program area is comprised of 9,493 acres in southwestern unincorporated Orange County (see Exhibit 1). If the land that is now part of Crystal Cove State Park (which has its own certified Public Works Plan) is also considered the Newport Coast area would extend from the 3 and one-half mile shoreline of the Pacific Ocean to the ridge of the San Joaquin Hills. The more gentler sloping Pelican Hill and Wishbone Hill areas are in the northwestern portion of the LCP area. These ridges and hillsides contain three major canyons, Buck Gully, Los Trancos and Muddy Canyon. On the eastern end of the LCP area are Moro Canyon and Emerald Canyon (see Exhibit 3). Extensive coastal sage scrub covers most of the area and portions of the LCP area are within the Natural Communities Conservation Planning (NCCP) program.

The land uses of the 9,493 LCP area (including the 2,807 acre Crystal Cove State Park) include 277 acres designated tourist commercial; 1,873 acres designated low, medium-low, medium and high density residential land use; and 7,343 acres of open space (recreation and conservation) land use. Included within the open space designation is 455 acres of golf course use (two 18 hole courses), private passive and active parks and publicly dedicated passive recreation open space

areas. The LCP allows for a total maximum of 2,600 residential units, 2,150 resort/overnight accommodations and 2.66 million square feet of commercial development.

C. Factors to be Considered in Substantial Issue Analysis

Section 30625 of the Coastal Act states that the Commission shall hear an appeal of a local government action unless it finds that no substantial issue exists with respect to the grounds on which the appeal has been filed. The grounds for an appeal identified in Public Resources Code section 30603 are limited to whether the development conforms to the standards in the certified LCP and to the public access policies of the Coastal Act.

The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. Section 13115(b) of the Commission's regulations simply indicate that the Commission will hear an appeal unless it "finds that the appellant raises no significant questions". In previous decisions on appeals, the Commission has been guided by the following factors.

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretations of its LCP; and
5. Whether the appeal raises local issues, or those of regional or statewide significance.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing petition for a writ of mandate pursuant to Code of Civil Procedure, section 1094.5.

Staff is recommending that the Commission finds Substantial Issue exists for the reasons set forth below.

D. Substantial Issue Analysis

As stated in Section III of this report, a local Coastal Development Permit may be appealed to the Commission on the grounds that it does not conform to the certified LCP or the public access policies of the Coastal Act. The Commission must then decide whether a substantial issue exists in order to hear the appeal.

In this case, the appellants contend that the County's approval of the proposed project does not conform to the requirements of the certified LCP (See Section I). Staff is recommending that the Commission concur that the locally approved project does not conform to the certified LCP and find that a substantial issue does exist with respect to the grounds on which the appeal has been filed.

1. Development Approved Outside of the LCP Area (Crystal Cove State Park)

Although the project description of the coastal permit approved by the local government states that the proposed development is located in Planning Areas PA 4A, 4B, 5, 6, 12C, 12E and 12G, a careful reading of the staff report and associated EIR indicates that development has also been authorized within Crystal Cove State Park. Finding #19 of the local approval states that the approved development "... *permits all off-site grading and remedial grading in Crystal Cove State Park (PA 17); provides an access road partially in Crystal Cove State Park leading to a future recreation facility in PA 12C; ... provides a pedestrian/emergency access tunnel and trails under Pacific Coast Highway and within Crystal Cove State Park Property; ...*" (Exhibit 5). Additionally, Figure 3.1.1 (Master Development Plan) for EIR 569 which describes the development associated with this permit identifies off-site grading and a road in Crystal Cove State Park.

Crystal Cove State Park, however, is outside of the jurisdiction of the Newport Coast LCP and therefore the County does not have authority to issue a local coastal development permit for development in the State Park. Only the Department of Parks and Recreation and the Coastal Commission, pursuant to the Public Works Plan provisions of the Coastal Act, can approve development within Crystal Cove State Park. The Newport Coast LCP specifically recognizes that the Public Works Plan provisions of the Coastal Act rather than the provisions of the certified LCP apply to Planning Area 17. The Newport Coast LCP (page II-7.3) states for Planning Area 17 that: "*Crystal Cove State Park's 'Public Works Plan' has already been certified by the Coastal Commission for Recreation PA 17 and, accordingly, is not part of this LCP*". Therefore, the appeal of the County's approval raises a substantial issue of consistency of the local approval with the certified LCP.

2. Removal of the Commission's Appeal Jurisdiction

Section 30603(a)(2) of the Coastal Act establishes that after certification of its local coastal program, the Commission's appeal jurisdiction is limited, in part, to development within 100 feet of any wetland or stream. At the time the Commission certified the Newport Coastal Program, the appeal areas were generally depicted in Exhibit Y of the LCP which showed stream courses throughout the LCP area and the adjacent Crystal Cove State Park (PA 17). The exhibit also illustrates that the area within 100 feet of the stream courses is appealable to the Coastal Commission. Exhibit Y is found in Exhibit 7 of this staff report.

Finding 19 of the local approval specifically states that the approval "deletes Appeal Jurisdiction Areas to allow for grading of USGS 'Blue- Line' Drainage Courses within

Residential, Open Space, and Recreation Planning Areas". The County's findings are unclear as to why such changes are being made to the Commission's Appeal Jurisdiction.

According to the local coastal permit, grading in Planning Areas (PA) 4A, 4B, 5, 6, 12E, and 12C will result in fill of the existing drainage courses within those Planning Areas. However, even if a local coastal permit allows the fill of stream courses, potentially removing the basis for future appeals of the surrounding area, it is premature for a local government to treat the Commission's appeal jurisdiction as being affected until after the physical change on the ground has legally occurred. That is, consistent with the definition of the Commission's appeal jurisdiction contained in section 7-9-118.6(i) of the County's LCP, the Commission will continue to exercise appeal jurisdiction within 100 feet of a stream unless and until the stream is physically eliminated pursuant to a local government permit which has become legally effective.

Pursuant to section 7-9-118.6(h) of the County's LCP a local approval is not effective until after the 10 working day appeal period to the Commission has expired (see Exhibit 8). As reflected in section 7-9-118.6(h) of the County's LCP, the 10 working day appeal period to the Commission does not commence until after the Commission receives a valid notice of final local action (see Exhibit 8). Because this local action has been appealed to the Commission, the filling of stream courses may never become effectively authorized. The determination of whether a development is appealable shall be made by the local government at the time the application for development within coastal zone is submitted. Pursuant to section 30603 of the Coastal Act and the definition of the Commission's appeal jurisdiction contained in section 7-9-118.6(i) of the County's LCP, this determination must be made based on the existing physical characteristics on the ground. Disputes regarding whether a development is appealable are ultimately resolved by the Commission.

Because the local government action treats the Commission's appeal's jurisdiction as being affected before a physical change has legally occurred on the ground, the local government's action in modifying the Commission's appeal Jurisdiction, as indicated in the changes to Exhibit Y, is inconsistent with the above-referenced provisions of the certified LCP regarding procedures for appeals to the Commission. The Commission therefore finds that the appeal of the County's approval raises a substantial issue of consistency of the local approval with the certified LCP.

3. Development Within Environmentally Sensitive Habitat Areas (ESHAs)

The local government's approval of the subject coastal permit allows the modification of or elimination of stream courses that are designated Environmentally Sensitive Habitat Areas (ESHAs) in the LCP. The modification or elimination of the stream courses is authorized for residential development purposes, for drainage facilities, private roads and for a future private recreational facility. As detailed below, some of the development within the ESHAs is clearly inconsistent with the Resource Conservation and Management Policies of the LCP.

The LCP defines ESHAs as follows: *"For purposes of Section 30107.5 of the Coastal Act, natural drainage courses designated . . . on the USGS 7-minute series map, Laguna Beach Quadrangle, . . . (hereafter referred to as "USGS Drainage Courses), coastal waters, wetlands, and estuaries are classified as "Environmentally Sensitive Habitat Areas" (ESHA's)." The LCP further classifies ESHAs as Category "A", "B", "C", or "D" and depicts them on Exhibit H (see Exhibit 13). Category "C" is the coastal waters along the seaward side Pacific Coast Highway which are designated both a Marine Life Refuge and an Area of Special Biological Significance. The LCP classifies the USGS Drainage Courses as Category A, B or D based on their habitat value. This classification was based on a biological inventory done at the time of the original Land Use Plan certification more than 18 years ago. Although wetlands are defined as ESHA, the LCP ESHA Map, Exhibit H shows only the USGS Drainage Courses and does not indicate the location of existing wetlands.*

Planning Areas 4A, 4B, 5, 6, 12C and 12E all contain environmentally sensitive habitat areas (ESHA) as defined by Section I-3, Resource Conservation and Management Policies. Planning Area 4A contains a Category "B" drainage and two Category "D" drainages; PA 4B and PA 6 contain a small portion of Category "D" drainages; a Category "D" drainage runs the entire length (from north to south) of PA 5; PA 12C is also bisected by a Category "A" drainage and contains a second Category "D" drainage and PA 12E is bisected by a drainage course which is classified as Category "A" in some areas and Category B in others. Planning Area 4A also contains approx. 0.05 acres of isolated wetlands and PA12C development will impact additional wetlands as discussed by the applicant in their response to comments on the pre-construction notice to the Army Corp of Engineers 404 application (see Exhibit 11). The local government's coastal development permit findings do not mention the presence of or permit fill of any wetlands in any Planning Areas.

a. Fill of Category A ESHA Inconsistent with LCP

The subject coastal development permit as approved by the local government would allow fill in the Category "A" ESHA stream course in PA 12C for the construction of a road to support private recreational use and a detention basin proposed to handle storm water

runoff from both developed and natural areas. This is in direct contradiction to the certified LCP which affords the highest protection to Category “A” and “B” ESHAs.

The findings and policies of the LCP concerning allowable uses in ESHAs are very specific. Page I-2.3 of the LCP states that Category “A” USGS Drainage Courses contain the most significant habitat areas and are subject to the most protection and are thus located entirely within Planning Areas which have a Recreation or Conservation land use designation. Although Category “B” ESHAs support less riparian vegetation than Category “A” streams and contain water only when it rains, the LCP also seeks to preserve these USGS Drainage Courses.

The LCP does not allow development within the stream courses of any Category A ESHA’s or within the stream courses of any Category B ESHAs, with one exception. Policy D. 1 on page I-3.9 of the LCP states:

**D. CATEGORY “A” & “B” ENVIRONMENTALLY SENSITIVE HABITAT
AREA POLICIES**

1. Except for the ESHA B located in Planning Area 4A, the natural drainage courses and natural springs will be preserved in their existing state. All development permitted in Category A and B ESHA’s shall be set back a minimum of 50 feet from the edge of the riparian habitat except as provided for in the following subsections. If compliance with the setback standards precludes proposed development which is found to be sited in the least environmentally damaging and feasible location, then the setback distance may be reduced accordingly.

The full text of the above policy and the subsections containing the exceptions are provided in Exhibit 10. The exceptions referred to in the above policy allow deviations from the minimum 50 foot set back from the edge of the riparian vegetation for roads, trail crossings, drainage and erosion control and related facilities and for habitat enhancement and/or fire control, but only when the permitted development is otherwise authorized consistent with the above policy. As specified in the above policy, except for the ESHA “B” located in Planning Area 4A, the natural drainage courses in Category “A” and “B” ESHAs are to be preserved in their existing state. This interpretation of the above policy and its exceptions is supported by the Development Policies of the LCP and the LCP maps. Policy E.10 of the Transportation/Circulation Policies, page I-4.24 states that, *“Roadway design will generally reflect a rural rather than urban character. Where feasible, precise roadway alignments shall preserve the natural topography and avoid environmentally sensitive areas”*. Additionally, LCP Map Exhibit S is the Backbone Drainage Concept (see Exhibit 9).

No drainage facilities are located within the stream courses of any Category “A” or “B” ESHAs consistent with ESHA Policy D.1 cited above. Exhibit S of the LCP shows a detention basin in Planning Area 12C but it is not located within the USGS drainage course.

The local coastal permit approves a detention basin and a road to serve private recreational use in the Category A ESHA within PA12C. The approval of a road and a detention basin within a Category A ESHA is inconsistent with the above-identified policies and maps of the certified LCP. Therefore the Commission finds that the appeal of the local government action raises a substantial issue of consistency with the ESHA policies of the certified LCP.

b. Fill of Category D ESHA in PA 5 Inconsistent With LCP

As stated above, the LCP contains specific policies as to which ESHAs can be modified or eliminated. Although Category “D” ESHAs are considered to be the least productive habitat areas due to the general absence of associated riparian vegetation, they are nonetheless USGS Drainage Courses and are protected as designated ESHAs. Even without riparian vegetation, drainage courses serve a valuable function in natural communities, including the deposition of sediment to the coast to aid in beach nourishment. Accordingly, the LCP does not allow for the wholesale elimination of all USGS drainages that are classified as Category “D” ESHAs. There are Category “D” ESHA’s that are preserved in Recreation or Conservation areas just as Category “A” ESHAs. Category “D” ESHAs that are preserved in Recreation or Conservation areas include those in PA 12A, Los Trancos Canyon Conservation Planning Area and in Crystal Cove State Park adjacent to the Muddy Canyon Conservation Area 12E.

Likewise, not all Category “D” ESHAs within development Planning Areas are allowed to be modified or eliminated. Policies F. 1, 2, and 3 of the Resource Conservation and Management Policies of the LCP, page I-3.22, regulate Category “D” ESHA impacts (see Exhibit 12).

Policy F.1 allows all Category D drainage courses only within PA 10A to be modified. However, Policy F.2 specifically calls out those Planning Areas where all vegetation and drainage courses may be modified or eliminated. The Category “D” ESHA in Planning Area 5 is not one of those listed. The Commission notes that the Category “D” ESHA in PA5 is a significant feature (See Exhibit 13). The USGS drainage course runs the entire length of the planning area from north to south.

The property owner has argued that the fact that Policy F. 2 on page I-3.22 does not allow the elimination of the drainage course and vegetation in PA 5 is a typographical error. The Commission disagrees with this contention based on the fact that the LCP Resource Conservation and Management Policies specifically lists Planning Areas that are to be excepted from its restrictions. For example, Policy D.1 specifically allows for the modification of the Category “B” ESHA in PA 4A. Similarly, if the LCP had intended that all Category “D” ESHA’s in Residential Planning Areas be allowed to be eliminated, a policy

such as Policy F. 1 which allows the fill of all drainages in Planning Area 10A would have been certified.

The locally issued coastal permit allows for the elimination of the Category “D” USGS Drainage Course in PA 5. The LCP policy which allows certain Category “D” drainages to be filled does not include the PA 5 USGS blue line stream. Therefore, the Commission finds that the appeal raises a substantial issue with regard to the ESHA protection policies of the certified LCP.

c. The fill of Wetlands Inconsistent With the LCP

The locally issued permit approves the fill of 0.05 acres of isolated wetlands in PA 4A for the purpose of residential development. Further, the local permit approves the fill of 0.13 acres of wetlands in PA 12C in conjunction with the detention basin and a private road. The local government’s findings do not mention the presence of or the basis for the fill of these wetlands. The stated purpose of the road is to provide residents of the future homes in PA 4A and 4B access to the private recreation facility in PA 12C. The detention basin would regulate storm water runoff from both planned developed areas and natural areas.

The applicants contend that the scattered wetlands in PA 4A are exempt from the Commission’s appeal jurisdiction under Section 13577(b)(2) of the Commission’s regulation. Section 13577(b)(2) provides that wetlands subject to the Commission’s appeal jurisdiction do not include:

“...wetland habitat created by the presence of and associated with agricultural ponds and reservoirs where the pond or reservoir was in fact constructed by a farmer or rancher for agricultural purposes; and there is no evidence [...] showing that wetland habitat predated the existence of the pond or reservoir. Areas with drained hydric soils that are no longer capable of supporting hydrophytes shall not be considered wetlands.”

In support of their contention, the applicants have submitted aerials documenting that the wetlands did not predate their agricultural operations. However, the applicant’s evidence also documents that the agricultural operations ceased in 1995. Despite the cessation of the agricultural operations, the wetlands remain viable. The Commission finds that the exemption provided in 13577(b)(2) does not apply to wetlands that currently exist independent of and disassociated from preexisting agricultural activities. The Commission also notes that the wetland fill at issue would support residential, not agricultural activities.

Given that the wetlands are within the scope of the Commission’s appellate review, the Commission goes on to assess the consistency of the wetland fill with the certified LCP. As explained above, the LCP defines wetlands as an environmentally sensitive habitat area (ESHA) even though they were not designated on the ESHA Map, Exhibit H. However, the LCP does not contain specific policies authorizing development within the wetlands. It is

possible that the LCP omits wetland specific policies because the wetlands at issue in the current appeal did not exist at the time the LCP was certified. Because there are no LCP policies specifically authorizing the fill of the wetlands permitted by the local approval, the Commission finds that the fill of wetlands as approved in the local permit raises a substantial issue of consistency with the certified LCP.

That the wetland fill raises a substantial issue of consistency with the certified LCP is also supported by the Appellate Court decision in *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493. The *Bolsa Chica* decision involved the Coastal Commission's approval of a local coastal program amendment that authorized development within wetlands and environmentally sensitive habitat areas. The Court of Appeal held that the Commission acted improperly in approving residential development and the expansion of a road in parts of the proposed development site that included an environmentally sensitive habitat area and wetlands. Given the existence of newly discovered wetlands and the omission of LCP policies that specifically govern permissible wetland fill, the Commission finds that the County's LCP must be interpreted in light of the *Bolsa Chica* decision. Because the County has interpreted its policies to allow residential development within wetlands, an environmentally sensitive habitat area, and the County's interpretation is not supported by findings which explain the basis for such fill, the Commission finds that the appeal raises a substantial issue of consistency with the certified LCP.

4. Estoppel and Justifiable Reliance

The applicants contend that the Commission should reject the appeal based on principles of estoppel and justifiable reliance. Specifically, the applicants contend that (1) the LCP specifically authorized a balance of development and preservation which represents a final decision with respect to the application of Coastal Act policies to the subject appeal; (2) the public benefits extended by Irvine in reliance on the LCP is an implied promise that approval of private development would not be withheld; (3) the County's approval of the development agreement constitutes an express promise that Newport Coast would not be subjected to new rules and interpretations.

The Commission rejects the applicant's contentions and finds that the appeal raises substantial issue. With regards to the applicant's first contention, the LCP does not represent a final decision on the ability of the applicant to undertake development within the Newport Coast. The LCP expressly acknowledges that a coastal development permit must first be obtained. Coastal development permit review is clearly an exercise of discretionary authority. Moreover, even if the LCP could constitute the final decision on the permissibility of development, as demonstrated above, the proposed project raises substantial issues of consistency with the certified LCP.

With regards to the applicant's second contention, the fact that the applicant has dedicated open space and created wetland habitat in other planning areas, even if voluntarily in

advance of LCP requirements, does not guarantee that development will be approved in the Planning Areas at issue in the subject appeal. The LCP itself precludes the acceptance of any offers to dedicate until after grading and building permits issue. The LCP Dedication Program Requirements and Procedures are contained in Exhibit 14 of this staff report. In addition, the LCP only allows acceptance of proportional dedications if the landowner is not able to undertake development for 10 years (see Exhibit 14). Therefore, given that the LCP provisions are contingent, the applicant can not justifiably rely on LCP provisions that expressly limit acceptance of dedications to advance the argument that approval of development would not be withheld.

Lastly, the existence of a development agreement between the County and the developer does not eliminate or alter the requirement that all development within the Newport Coast area must be consistent with the certified LCP. As demonstrated above, the proposed project raises issues of consistency with the certified LCP.

VI. Commission Direction of Staff to Appeal of Local Permit PA 98-0187 (Muddy Canyon Recreation Center)

Subsequent to the County's July 21, 1998 approval of the subject seventh amendment to master coastal development permit (PA 97-0152), the County approved coastal permit application PA 98-0187 for the construction of a private recreation facility in PA 12C. Local coastal permit PA 98-0187 approved the Muddy Canyon Recreation Center on 32 acres of the 98 acre planning area including equestrian facilities with stable for up to 50 horses, play field and a multi-use area, swimming pool complex, four lighted tennis courts, a covered picnic area, trails, parking for 84 cars, and a caretaker's residence. The permit also approved an additional 50,000 cubic yards of grading to establish final pad elevations and the internal road system.

The infrastructure development in PA 12C approved by the County and the subject of this appeal includes the following: mass grading of 32 acres of the 98 acre planning area including the construction of any necessary retaining walls, backbone infrastructure, including a detention basin in a wetland area adjacent to Muddy Canyon, a 32 foot wide collector road (with sidewalk) and public and private trails. Other approved development which affects the development of PA 12C is the off-site construction of a private road in Crystal Cove State Park (PA 17) which provides access to the private recreation facility and the adjacent Crystal Cove State Park for the future residents of adjacent PA 4A and 4B and PA 3A and 3B. The Planning Area 12C contains both a Category "A" and Category "D" ESHA as well as wetlands. The permit approved by the County authorizes the fill of wetlands and a Category "A" ESHA for the construction of the detention basin and private road. PA 12C is one of the planning areas at issue in the subject appeal. The infrastructure to support the private recreation facility is also the subject of this appeal.

Staff is recommending that the Commission direct the staff to appeal local coastal permit PA 98-0187 for the Muddy Canyon Recreation Center in PA 12C. If the Commission finds that the subject appeal raises substantial issue as is being recommended, then the applicant would not have an approved coastal permit to undertake the substantial mass grading of the site, minor boundary adjustment, or to construct the road or utility connections necessary for the recreation facility as designed. Therefore approval of any subsequent development in PA 12C prior to final action on the underlying infrastructure permit PA 97-0152 which is the subject of this appeal, is premature.

The Commission also has a legal basis on which to direct staff to appeal local permit PA 98-0187. On March 29, 1999 the County of Orange filed a Notice of Final Decision for coastal permit PA 98-0187 for the approval of a private recreation facility in PA 12C for Irvine Community Development Company. The Notice of Final Decision indicated that the approved development was not appealable to the Coastal Commission (Exhibit 15). This determination of the appeal jurisdiction is incorrect as all development within 100 feet of a wetlands or a stream, regardless of the stream's ESHA designation, is appealable to the Commission pursuant to section 30603(a)(2) of the Coastal Act and section 7-9-118.6(i) of the certified LCP.

The findings of the local government approval do not indicate the basis for its incorrect determination that the permit is not appealable to the Commission. Perhaps the determination was based on the fact that the local government's action on the underlying permit which approved the infrastructure for the recreation facility also improperly deleted the Commission's appeal jurisdiction from this and other areas included in the local government's action on PA 97-0152. However, as explained above, unless and until a stream or wetland is physically eliminated through a valid coastal permit, all development within 100 feet of the stream or wetland is appealable to the Commission.

Because the local government's Notice of Final Decision for permit 98-0187 improperly identified appealable development as nonappealable, the Commission has still not received a valid Notice of Final Local Action. Therefore, the local government action on

the permit is appealable to the Commission for the reasons stated above and detailed in Section III of this staff report. As stated above, permit PA 98-0187 can not become effective until a proper notice is received and the Commission's 10 working day appeal period is established and runs without an appeal being filed, or if an appeal is filed, until the Commission's final action on the appeal.

Therefore, the Commission directs the staff to send a Notice of Deficient Notice to the local government. Upon receipt of a proper notice of final local action indicating that the permit action is appealable to the Commission, staff will seek an appeal of the action from two Commissioners. Through the appeal process, the Commission will be able to evaluate the impacts of the proposed fill of the on-site wetlands consistent with the action the Commission takes on the subject appeal .

ADDITIONAL INFORMATION NEEDED FOR DE NOVO ACTION

Since the Commission's appeal of the County's approval, the applicant and Commission staff have had several meetings. The applicant has provided staff with a significant amount of additional information regarding the resources of the site, arguments regarding the applicant's claim that the subject appeal is untimely, and arguments that the Commission should reject the appeal based on the application of estoppel and justifiable reliance.

Staff has not had adequate time to review the submitted information to determine if it is adequate or whether additional information and/or clarification is needed. The de novo staff recommendation can not be prepared until staff has had time to review the submitted information to determine if it is adequate.

In addition, on September 24, 1999, the day this staff report was prepared, the applicant submitted a biological evaluation of the ESHAs in Planning Areas 4A, 4B, 5, 6 and 12B. It is unclear as to why a biological evaluation of PA 12B was provided since the appealed local permit did not approve development in this Planning Area. However, the appealed permit did approve development in PA 12C where there is both a Category "A" and "D" ESHA and wetlands that will be impacted but the biological evaluation does not address this planning area. The de novo action can not be considered until this information is provided to staff and staff has sufficient time to review it.

Further, before the Commission can consider the de novo action on this permit additional information must be submitted to Commission staff for the preparation of the de novo recommendation. In addition to an accurate assessment of the existing resources for Planning Area 12C, an alternatives analysis which includes avoidance of all impacts to ESHA resources must also be provided.

Finally, Staff also notes that the applicant has proposed additional development not considered by the County in its approval of the subject permit. This development must be included by the applicant within an amended permit application that will be utilized for purposes of any de novo hearing on the proposed project.